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# Constitutional Law -- Equal Protection Clause -- Exclusion of a Class from Jury Service

Charles Kivett

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state corporation receives the same benefits and protection as intra-state vendors.<sup>20</sup>

If such an analysis is correct, the decision should have little practical effect upon the present administration and collection of use taxes,<sup>21</sup> because the way will have been left open to impose tax collecting obligations on foreign corporations which make deliveries into a taxing state after encroaching upon its markets by inducing (e.g., by direct advertising, mail and telephone solicitation, etc.) its customers to cross the state line for tax-saving purposes. On the other hand, if this decision means that such corporations may now escape liability, its effect will no doubt be to increase the number of merchants seeking to capitalize on the sales tax of neighboring states at the expense of the local market, thereby further increasing the difficulties of administration and collection of the use tax.

WILLIAM E. GRAHAM, JR.

### Constitutional Law—Equal Protection Clause—Exclusion of a Class from Jury Service

Twenty years ago the United States Supreme Court decided that discrimination of a nature prohibited by the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution<sup>1</sup> occurs when it is shown by a Negro defendant that for a generation or longer no person of African descent has been called for jury service although qualified Negroes are available within the county wherein the trial is held.<sup>2</sup> The rule is sometimes referred to as the "Norris" rule.

Recently in *Hernandez v. Texas*,<sup>3</sup> the Court was faced with the

<sup>20</sup> In *People v. West Pub. Co.*, 35 Cal. 2d 80, 91, 216 P. 2d 441, 448 (1950), the California Supreme Court held the defendant publishing company liable for the collection of the use tax where it maintained offices and soliciting agents within the state. In so holding, the court used the following language: "The state provided a market in which appellant operated in competition with local law book publishers, and its salesmen received the same protection and other benefits from the state as salesmen carrying on business activities for a company engaged in intrastate business."

<sup>21</sup> Of course, the decision might have some effect because the collection of the use tax through the vendor is the most effective method of enforcing the tax and the decision exempts one class of foreign vendors from that responsibility. However, at present few state statutes are as broad as the Maryland statute in defining companies "engaged in business within the state," but they are, for the most part, directed at foreign corporations maintaining places of business within the state or engaging in some form of local solicitation or advertising.

<sup>1</sup> U. S. CONST. AMEND. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

<sup>2</sup> *Norris v. Alabama*, 294 U. S. 587 (1935). No Negro had served on the jury within the memory of witnesses who had lived in the county for life. The pronounced rule is one of presumption, and may be overcome by a sufficient showing of facts by the state.

<sup>3</sup> 74 Sup. Ct. 667 (1954).

question of whether the rule should be extended to cover nationalities as well as races.

In this case the defendant, an American citizen of Mexican descent, was indicted for murder, tried and convicted. In his appeal to the Texas Court of Criminal Appeals he stated that no person of Mexican extraction had served on a county grand jury or petit jury for the past twenty-five years, although qualified persons of Mexican descent resided within the county. Though unable to prove actual discrimination, the defendant insisted that the "Norris" test should be applied to prove his allegations. Countering, the state maintained that the rule applied only to members of different races, and that since persons of Mexican descent are primarily members of the white race no presumption of discrimination should be found. The defendant's conviction was affirmed,<sup>4</sup> and the United States Supreme Court granted certiorari.<sup>5</sup>

Mr. Chief Justice Warren, speaking for a unanimous Court, reversed the conviction, holding: (1) that the state court erred in limiting the application of the Equal Protection Clause of the Fourteenth Amendment to the white and Negro races; (2) that the "Norris" rule applied; and (3) that the state had failed to rebut the prima facie showing of discrimination.

By way of background, the Supreme Court has long held that a state may not pass a law prohibiting Negroes from serving on juries.<sup>6</sup> "Whenever by any action of a state, whether through its legislature, through its courts or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as . . . jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him. . . ."<sup>7</sup>

The list of persons from which the jury is to be drawn must contain a cross-section of the defendant's community.<sup>8</sup> However, there is no

<sup>4</sup> *Hernandez v. Texas*, 251 S. W. 2d 531 (Tex. Crim. App. 1952).

<sup>5</sup> *Hernandez v. Texas*, 346 U. S. 811 (1953).

<sup>6</sup> *Bush v. Kentucky*, 107 U. S. 110 (1882). *Neal v. Delaware*, 103 U. S. 370 (1880), involved a statute whereby qualified voters could serve as jurors, and by the Delaware Constitution only whites could vote. *Strouder v. West Virginia*, 100 U. S. 303 (1879).

<sup>7</sup> *Carter v. Texas*, 177 U. S. 442, 447 (1900). Here the trial court refused to hear witnesses offered by the defendant to prove his allegation of discrimination. In *Rogers v. Alabama*, 192 U. S. 226, 231 (1904), the court refused to pass on the question of the defendant's rights under the Alabama Constitution on a motion to quash the indictment. *Gibson v. Mississippi*, 162 U. S. 565 (1896), involved the Mississippi constitutional provision that no person could be a juror unless a qualified voter, able to read and write. See also *Neal v. Delaware*, *supra* note 6.

<sup>8</sup> *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 220 (1946). "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community."

guaranty to him of a jury composed entirely of members of his own race,<sup>9</sup> nor even a mixed jury.<sup>10</sup> But jury commissioners may not limit those from whom juries are selected to persons of their own personal acquaintance, for "if there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."<sup>11</sup> It is a commissioner's duty to familiarize himself "with the qualifications of the eligible jurors of the county without regard to race or color."<sup>12</sup>

Where the evidence introduced by the defendant shows only that no Negro served on the grand jury that indicted and the petit jury that tried him, a motion to quash the indictment based on alleged discrimination is properly denied.<sup>13</sup> But a *prima facie* case is made out upon a showing of long continued, systematic exclusion of Negroes.<sup>14</sup> Uncontroverted affidavits are sufficient to show a systematic and arbitrary exclusion because of race or color.<sup>15</sup> And, where white and yellow tickets were used by jury commissioners, for the white and Negro races respectively, and no Negro appeared on the jury panel, though qualified members of that race resided in the county, a *prima facie* case of discrimination was established.<sup>16</sup>

Discrimination against members of a defendant's political party has been held unconstitutional.<sup>17</sup> So too, where there was deliberate and

<sup>9</sup> *Preleau v. United States*, 271 Fed. 361 (D. C. Cir. 1921).

<sup>10</sup> *Alkins v. Texas*, 325 U. S. 398 (1945); *Martin v. Texas*, 200 U. S. 316 (1906) (the defendant demanded a mixed jury as a matter of right); *Virginia v. Rives*, 100 U. S. 313 (1879) (the defendant moved that the venire, which was composed entirely of whites, be modified so as to allow one third thereof to be composed of Negroes.).

<sup>11</sup> *Smith v. Texas*, 311 U. S. 128, 132 (1940). Jury commissioners testified that the reason they failed to select Negroes was that they did not know the names of any who were qualified.

<sup>12</sup> *Cassell v. Texas*, 339 U. S. 283, 289 (1950).

<sup>13</sup> *Smith v. Mississippi*, 162 U. S. 592 (1896). See *Thomas v. Texas*, 212 U. S. 278 (1909); *Martin v. Texas*, 200 U. S. 316 (1906).

<sup>14</sup> *Norris v. Alabama*, 294 U. S. 587 (1935); *Cassell v. Texas*, 339 U. S. 282 (1950) (out of twenty-one grand juries, only a few contained one Negro, while seven per cent of the eligible voters were Negroes); *Patton v. Mississippi*, 332 U. S. 463 (1947) (one third of the population was Negro, but none had served on the grand jury for thirty years); *Hill v. Texas*, 316 U. S. 400 (1942) (8,000 of the 66,000 poll tax payers in the county were Negroes); *Smith v. Texas*, 311 U. S. 128 (1940) (for seven years, during which time thirty-two grand juries had been called, only five Negroes served, while twenty per cent of the population was Negro). See *Pierre v. Louisiana*, 306 U. S. 345 (1939).

<sup>15</sup> *Hale v. Kentucky*, 303 U. S. 613, 616 (1938).

<sup>16</sup> *Avery v. Georgia*, 345 U. S. 559 (1953). The Court made no mention of the rule that there has to be shown a systematic exclusion.

<sup>17</sup> *Kentucky v. Powers*, 139 Fed. 452 (C. C. E. D. Ky. 1905), *rev'd on other grounds*, 201 U. S. 1 (1906). The defendant, a Republican, was charged with the crime of being an accessory before the fact to murder. He had been convicted by the trial court three times, and on each occasion the appellate court sent the case back for a new trial due to error. He petitioned for removal to the federal court, on the ground that he had a right to be tried by jurors without discrimination against those who belonged to the same political class to which he belonged, to wit, Republican, and that members of that class had been excluded,

systematic exclusion of members of a particular religious faith,<sup>18</sup> and where wage earners were arbitrarily excluded from service on a jury panel,<sup>19</sup> discrimination was found. The systematic and intentional exclusion of women from grand or petit jury panels in a federal district court was held to warrant a dismissal of an indictment against a woman charged with a federal offense.<sup>20</sup> The Constitution, however, does not prohibit a state from excluding from jury service certain occupational groups,<sup>21</sup> and the use of a special or "Blue Ribbon" jury in counties of one million or more people in certain classes of cases does not on its face deny equal protection of the laws.<sup>22</sup>

As to procedural aspects, one who wishes to avail himself of the defense that there was discrimination in the selection of the jurors who indicted or tried him should raise the constitutional question in the state court during the trial, and if overruled should appeal to the highest state court. If he fails to do so, he cannot have the adverse decision reviewed by a federal court.<sup>23</sup> Generally a challenge to the array before trial is used to quash the indictment,<sup>24</sup> or a motion is

denying him his right to the equal protection of the laws guaranteed by the Fourteenth Amendment. The petition was denied and the case came before the federal court on a motion for habeas corpus to remove him from the custody of the state and put him in the custody of the United States. In granting the motion the federal court stated that the defendant was entitled to such removal upon a showing of such discrimination.

<sup>18</sup> *Juarez v. State*, 102 Tex. Crim. App. 297, 277 S. W. 1091 (1925). (Criminal prosecution for selling liquor, in a state court, and the defendant petitioned to have the indictment set aside because Roman Catholics had been excluded from jury service, and that he was a member of that denomination, and that such exclusion denied him his equal rights under the Fourteenth Amendment. Held: it was the duty of the court to hear the evidence and if such discrimination were found the indictment should have been set aside.)

<sup>19</sup> *Thiel v. Southern Pacific Co.*, 328 U. S. 217 (1946). This was a civil action brought in a federal court under the Federal Employers Liability Act. The exclusion of daily wage earners from the jury panel was held to be reversible error, not on constitutional grounds, but on the ground of improper administration of the jury system in the federal courts.

<sup>20</sup> *Ballard v. United States*, 329 U. S. 187, 195 (1946). The woman had violated a federal criminal statute and the Court said that in a state where women are permitted to serve as jurors under local law, a federal jury panel from which women are intentionally and systematically excluded is not properly constituted and the Court will exercise its power of supervision over the administration of justice in the federal courts to correct the error. The Court was upholding the tradition that trial by jury contemplates an impartial jury from a cross-section of the community.

<sup>21</sup> *Rowlings v. Georgia*, 201 U. S. 638 (1906). If the exclusion of the class is for the good of the community, then the law is proper. (Statute excluded from jury service lawyers, ministers, preachers, doctors, dentists, railroad firemen and engineers).

<sup>22</sup> *Fay v. New York*, 332 U. S. 261, 271 (1947). "In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up procedures in advance of trial to eliminate from the jury panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain their disqualifications."

<sup>23</sup> *In re Wood*, 140 U. S. 278 (1891).

<sup>24</sup> *Hill v. Texas*, 316 U. S. 400, 406 (1942); *Smith v. Texas*, 311 U. S. 128, 130 (1940); *Gibson v. Mississippi*, 162 U. S. 565, 584 (1896).

made to quash the trial jury panel. There is a possible alternative procedure: a defendant who is denied or cannot enforce in a state court any law providing for the equal civil rights of United States citizens may have the case removed to a federal district court.<sup>25</sup>

Apparently no state court has held, as did the Supreme Court in the principal case, that systematic exclusion of a nationality from jury service violates the Equal Protection Clause of the Fourteenth Amendment as to a defendant descended from that nationality, but there are dicta to that effect.<sup>26</sup> Language used by the Texas court itself in several cases denotes a belief that exclusion of citizens of a particular nationality from jury service is a denial of equal protection of the laws where there is proof of actual discrimination.<sup>27</sup> In fact, when the instant case was before the state court, it was stated that "it cannot be said, *in the absence of proof of actual discrimination*, that appellant has been discriminated against in the organization of such juries. . . ."<sup>28</sup> (Emphasis supplied). In *Juarez v. Texas*,<sup>29</sup> the systematic exclusion of Catholics from jury service was held to be violative of the Fourteenth Amendment. So it appears that the Texas court has had no trouble applying the "Norris" rule to classes other than white or Negro, except where the question presented involved the exclusion of persons of Mexican descent, and even there it intimated that the rule should be applied to the latter group if actual discrimination were shown against the defendant. No valid reason was given for the distinction.

The decision in the principal case extends the "Norris" rule for the first time. That the Court ruled correctly is manifest from the trend established in the prior decisions. It is equally manifest that the Court will continue to expand the application of the rule if the occasions arise. The Fourteenth Amendment, though enacted and ratified because of fear of discrimination against a particular race, is

<sup>25</sup> 16 STAT. 144 (1870), 28 U. S. C. 1443 (1952). "Any of the following actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . . ." Apparently *Strouder v. West Virginia*, 100 U. S. 303 (1879) restricts this to cases where the discrimination is by the constitution or laws of a state.

<sup>26</sup> *State v. Brown*, 233 N. C. 202, 205, 63 S. E. 2d 99, 101 (1950). "It has been the consistent holding of this jurisdiction . . . that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand." See *Richards v. State*, 144 Fla. 177, 181, 197 So. 772, 774 (1940).

<sup>27</sup> *Sanchez v. State*, 147 Tex. Crim. Rep. 463, 181 S. W. 2d 87 (1944); *Carrasco v. State*, 130 Tex. Crim. Rep. 659, 95 S. W. 2d 433 (1936); *Ramirez v. State*, 119 Tex. Crim. Rep. 362, 40 S. W. 2d 138 (1931).

<sup>28</sup> *Hernandez v. State*, 251 S. W. 2d 531, 536 (Tex. Crim. App. 1952).

<sup>29</sup> 102 Tex. Crim. App. 297, 277 S. W. 1091 (1925).

not restricted in its application to members of that race. Its protection is also available "when the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification."<sup>80</sup>

CHARLES KIVETT.

### Criminal Law—Premeditation and Deliberation—Jury Instructions—Brutality of the Killing as Affecting

It is proper in North Carolina in a first degree murder trial for the question of the defendant's premeditation and deliberation to go to the jury with the instructions that the jury may use the conduct of the accused before and after the crime, along with other attendant circumstances, in deciding whether the elements of premeditation and deliberation were present.<sup>1</sup> Our court has held to be admissible as evidence of the defendant's premeditation and deliberation: absence of quarrels between the accused and the deceased,<sup>2</sup> previous threats,<sup>3</sup> preparations made for the crime,<sup>4</sup> absence of provocation,<sup>5</sup> declarations made by the accused,<sup>6</sup> and subsequent acts of the accused,<sup>7</sup> other than flight.<sup>8</sup>

But there is some uncertainty in the holdings of the court as to the exact circumstances in which the jury should consider the subsequent acts of the accused in determining premeditation and deliberation. This uncertainty arises when cases approving an unqualified in-

<sup>80</sup> *Hernandez v. Texas*, 74 Sup. Ct. 667, 670 (1954).

<sup>1</sup> *State v. Lamm*, 232 N. C. 402, 61 S. E. 2d 188 (1950); *State v. Chavis*, 231 N. C. 307, 56 S. E. 2d 678 (1949); *State v. Harris*, 223 N. C. 697, 38 S. E. 2d 29 (1943); *State v. Evans*, 198 N. C. 82, 150 S. E. 678 (1929).

<sup>2</sup> *State v. Watson*, 222 N. C. 672, 24 S. E. 2d 540 (1943); *State v. Baity*, 180 N. C. 722, 105 S. E. 149 (1920). It is interesting to note that while the absence of quarrels between the accused and the deceased has been held to be evidence from which the jury could infer premeditation and deliberation, the presence of quarrels between the accused and the deceased has only been held by our court to be evidence from which the jury may infer malice and ill-feeling.

<sup>3</sup> *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Bowner*, 214 N. C. 249, 199 S. E. 31 (1938); *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938); *State v. Grainger*, 157 N. C. 628, 73 S. E. 149 (1911).

<sup>4</sup> *State v. Baity*, 180 N. C. 722, 105 S. E. 200 (1920); *State v. Daniels*, 164 N. C. 464, 79 S. E. 953 (1913).

<sup>5</sup> *State v. Stewart*, 226 N. C. 299, 38 S. E. 2d 29 (1946); *State v. Cain*, 178 N. C. 724, 100 S. E. 884 (1919).

<sup>6</sup> *State v. Johnson*, 172 N. C. 920, 90 S. E. 426 (1916).

<sup>7</sup> *State v. Westmoreland*, 181 N. C. 590, 107 S. E. 438 (1921).

<sup>8</sup> *State v. Blanks*, 230 N. C. 501, 53 S. E. 2d 452 (1949); *State v. Evans*, 198 N. C. 82, 50 S. E. 2d 678 (1929); *State v. Steele*, 190 N. C. 506, 130 S. E. 308 (1925). The reason for not holding flight as evidence from which the jury might infer premeditation and deliberation is that flight from a crime might just as easily result from a fear of guilty circumstances as from a guilty conscience.